SCC File No. 39301

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN)

BETWEEN:

JASON WILLIAM COWAN

Appellant/Respondent
(Respondent)

- and -

HER MAJESTY THE QUEEN

Respondent/Appellant
(Appellant)

FACTUM OF THE RESPONDENT JASON WILLIAM COWAN

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I: OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. The respondent, Jason Cowan, was charged with armed robbery after a masked man with a knife robbed a Subway restaurant in Regina, Saskatchewan. At trial, the Crown advanced two theories of Mr. Cowan's liability: he was either the masked robber, or he abetted or counselled the masked robber. After a trial before a judge sitting alone, the trial judge acquitted Mr. Cowan on both theories of liability. Because identity was a central issue at trial, the trial judge expressly found that he had a reasonable doubt about whether Mr. Cowan was in fact the masked perpetrator.

2. The Crown appealed the acquittal to the Court of Appeal for Saskatchewan, alleging legal errors in the trial judge's treatment of both theories of liability. While the majority of the Court of Appeal determined that the trial judge erred in his analysis of the Crown's party liability theory, the Court of Appeal unanimously held that the Crown had not established a material legal error in the trial judge's analysis on the principal liability theory. Accordingly, the majority of the Court of Appeal ordered a new trial for Mr. Cowan on the robbery charge but limited the new trial to the issue of whether Mr. Cowan was guilty as a party to the robbery.

3. The Crown was granted leave to appeal the limiting order made by the majority of the Court of Appeal, arguing that the majority of the Court of Appeal erred in making the limiting order.

4. The Crown's arguments should not be accepted. Section 686(8) of the *Criminal Code* gave the Court of Appeal jurisdiction to make the order for a limited new trial. The limiting order was what justice required in this case as it would stop the Crown from relitigating the issue of principal liability as it had been conclusively resolved in Mr. Cowan's favour. The trial judge's undisturbed findings at trial amounted to an express finding of fact that Mr. Cowan was not the masked robber. The Crown cannot be entitled to relitigate this finding at a new trial after the Court of Appeal unanimously decided there were no material errors in the trial judge making that finding on the

issue of principal liability. Should Mr. Cowan's appeal as of right be dismissed, the Crown's appeal should also be dismissed.

B. STATEMENT OF FACTS

5. Mr. Cowan relies on his statement of facts as set out in his appellant's factum on his appeal as of right.

PART II: QUESTION IN ISSUE

ISSUE: Did the majority of the Court of Appeal err by ordering a trial limited to the issue of party liability?

6. Mr. Cowan submits the answer is no. The majority of the Court of Appeal was correct in ordering a limited new trial.

PART III: ARGUMENT

7. The majority of the Court of Appeal had jurisdiction to limit an order for a new trial, as a matter of fairness, to prevent the Crown from relitigating an issue that had been conclusively resolved in Mr. Cowan's favour. The trial judge made a clear statement in his reasons for judgment that he had a reasonable doubt on the issue of Mr. Cowan's identity as the principal offender. Although they were divided on the issue of the Crown's party liability issue, the Court of Appeal was unanimous in holding that there was no material error in the trial judge's analysis on the Crown's principal liability theory. Accordingly, justice required the majority of the Court of Appeal to limit the order for a new trial to the issue of party liability so that the Crown could not relitigate the issue of Mr. Cowan's identity as the principal robber at the new trial.

The Broad Ancillary Power of Section 686(8)

8. Where the Crown has succeeded in persuading the Court of Appeal that there was a material legal error in an acquittal entered by a judge sitting without a jury – as it did here on the

party liability theory – section 686(4) of the *Criminal Code* provides for two remedies. The Court of Appeal could order a new trial, or it could enter a conviction. The majority of the Court of Appeal declined to enter a conviction, so the majority was obligated to order a new trial. Contrary to the Crown's submissions, the Court of Appeal's jurisdiction does not end there.

9. Section 686(8) of the *Criminal Code* provides that the Court of Appeal may, when ordering a new trial pursuant to section 686(4), make any additional order that justice requires. This Court has very recently summarized the three requirements for an ancillary order under section 686(8) in *R v R.V.*, 2021 SCC 10 at para 74:

> Under s. 686(8) of the *Criminal Code*, a court of appeal has the power whenever it exercises "any of the powers conferred by subsection (2), (4), (6) or (7) . . . [to] make any order, in addition, that justice requires". The *Criminal Code* also vests that power in this Court (s. 695(1)). For an appellate court to issue an order under its s. 686(8) residual power, three requirements must be met (*R. v. Thomas*, 1998 CanLII 774 (SCC), [1998] 3 S.C.R. 535). First, the court must have exercised one of the triggering powers conferred under s. 686(2), (4), (6) or (7). Second, the order issued must be ancillary to the triggering power. Consistent with the provision's "broad remedial purpose", this Court has taken a flexible approach in determining whether the order is "in addition" to the exercise of the triggering power (*R. v. Hinse*, 1995 CanLII 54 (SCC), [1995] 4 S.C.R. 597, at para. 30). In particular, the additional order need not directly advance the exercise of the triggering power (*Hinse*, at paras. 31-32; see, e.g., *R. v. Power*, 1994 CanLII 126 (SCC), [1994] 1 S.C.R. 601, at pp. 615-18; *R. v. Provo*, 1989 CanLII 71 (SCC), [1989] 2 S.C.R. 3, at pp. 19-21; *Terlecki v. The Queen*, 1985 CanLII 16 (SCC), [1985] 2 S.C.R. 483, at pp. 483-84). It is enough that the ancillary order not be "at direct variance with the court's underlying judgment" (*Thomas*, at para. 17; see also *R. v. Warsing*, 1998 CanLII 775 (SCC), [1998] 3 S.C.R. 579, at paras. 72-74). Third and finally, the order must be one that "justice requires".

10. The first of the three requirements was plainly established in this case. The majority of the Court of Appeal's residual discretion was triggered by allowing the Crown's appeal on the issue of party liability and setting aside the acquittal under section 686(4).

11. Second, the limiting order was ancillary to the triggering power. Consistent with the flexible approach, limiting a new trial to a specific theory of liability would not be at direct variance with the judgment setting aside the acquittal. By ordering a new trial, Mr. Cowan was

returned to a condition of presumptive innocence on the robbery charge. A limiting order for a new trial is therefore consistent with the presumption of innocence and the judgment setting aside the acquittal, as explained in *R.V.* at para 76:

> Because setting aside a conviction returns the accused to a condition of presumptive innocence, an appellate court does not have jurisdiction under s. 686(8) to set aside a conviction and then deny the jury the option of finding the accused not guilty (*Thomas*, at para. 22). However, staying a proceeding is not at odds with setting aside an acquittal. Setting aside an acquittal, like setting aside a conviction, puts the accused in a position of presumptive innocence. As staying a proceeding is tantamount to a finding of not guilty, it is perfectly consistent with the presumptive innocence that attaches when this Court sets aside the acquittal (*R. v. Jewitt*, 1985 CanLII 47 (SCC), [1985] 2 S.C.R. 128, at pp. 147-48; *R. v. Kalanj*, 1989 CanLII 63 (SCC), [1989] 1 S.C.R. 1594, at p. 1601; *R. v. Puskas*, 1998 CanLII 784 (SCC), [1998] 1 S.C.R. 1207, at para. 1). Ordering a stay is therefore "in addition" to — that is, ancillary to — the power exercised under s. 686(4).

12. Ordering a limited new trial is therefore "in addition" to the power exercised by the majority of the Court of Appeal under section 686(4). Ordering a limited new trial is comparable to ordering the continuation of a trial, an ancillary power that was expressly approved in *R v Bellusci*, 2012 SCC 44 at para 33, 40, [2012] 2 SCR 509. See, also, *R v Yelle*, 2006 ABCA 276, 397 AR 287.

Justice Required a Limited Trial

13. Mr. Cowan submits that the Crown's appeal centres on whether the third requirement was met under section 686(8), specifically, whether the limiting order was what justice required. In the circumstances of this case, justice required the limiting order to avoid the unfairness that would arise by allowing the Crown to relitigate the issue of whether Mr. Cowan was the masked robber.

14. What justice requires under section 686(8) should be assessed with reference to the administration of justice, which includes consideration of prejudice and fairness. This Court referred to these factors in *Bellusci* at para 42:

> Continuation of the trial will not always be preferable or even possible. It is in any event an order that can properly be made only where the interests of justice require it, where there is no undue prejudice to the parties, and where no unfairness would result. [Emphasis added]

15. An order under section 686(8) limiting issues for a new trial can therefore be in the interests of justice to ensure that a party does not suffer undue prejudice or unfairness at a new trial.

16. Mr. Cowan submits that a limiting order does not need to be restricted to specific offences (i.e. limiting a trial to manslaughter and not murder, as was the case in *R v Druken*, 2002 NFCA 23 at paras 91-94, 211 Nfld & PEIR 219) but orders can be directed to any legal or factual issues that need not be relitigated, which can include a specific theory of liability. Resolving factual issues with resort to section 686(8) was the case in *R v Luedecke*, 2008 ONCA 716, 93 OR (3d) 89, per Doherty, J.A. (at paras 137 and 139):

> The accused supports the order limiting the scope of the new trial. He does not seek to relitigate the voluntariness issue. In those circumstances, it cannot be said that a limit on the scope of the new trial would interfere with the accused's conduct of his own defence. To the contrary, the proposed order would reflect the manner in which the respondent wishes to conduct his defence. The position of the respondent with respect to the proposed limitation on the new trial distinguishes this case from *Wade*, where the accused very much wanted to relitigate the voluntariness issue that he had lost at the initial trial.
>
> …
>
> Apart from the jurisdictional argument, the Crown does not advance any submissions to suggest that an order limiting the scope of the respondent's new trial would be unfair to the interests of justice represented by the Crown, cause practical problems at the new trial, or otherwise interfere with the due administration of justice. The respondent, however, make a convincing case that it would be unfair to compel him to relitigate the voluntariness issue. He successfully established on a balance of probabilities that his conduct was involuntary. The trial judge fully and fairly reviewed the evidence before making that finding. His review reveals no error. Forcing a re-litigation of the voluntariness issue over the respondent's objection many years after the relevant events occurred would be unfair to the respondent and unlike to produce either substantive or procedural justice. [Emphasis added]

17. Rather, if a trial judge has clearly and conclusively made a finding in favour of the accused such as having a reasonable doubt respecting of one theory of liability, and the Court of Appeal declines to overturn the acquittal with respect to that theory of liability, then it should be within the Court of Appeal's jurisdiction under section 686(8) to make an order that prevents the Crown from relitigating that theory of liability at a new trial since a finding respecting that theory has been conclusively made in favour of the accused.

18. The power to make such an order is consistent with the equitable principles found in this Court's ruling in *R v Mahalingan*, 2008 SCC 63 at paras 26-31, [2008] 3 SCR 316, in that issue estoppel can extend, not just to factual findings, but to matters resolved on the basis of reasonable doubt:

> Once a trial judge has concluded that the Crown has failed to prove a factual issue, the matter is decided against the Crown, and the Crown should be estopped from relitigating it. It should not matter whether the Crown failed to prove the fact because the trial judge had a reasonable doubt, or because the trial judge expressly found against the fact the Crown is trying to prove. The burden on the Crown to prove its case beyond a reasonable doubt is a fundamental aspect of our criminal justice system. The Crown should not be able to look to the standard of proof as an excuse to relitigate matters.
>
> Second, to exclude issues resolved on the basis of reasonable doubt from the scope of issue estoppel gives insufficient weight to the value of finality in litigation. Trial judges, charged with the duty of determining whether the Crown has proved it case beyond a reasonable doubt, frequently state their findings in terms of having a reasonable doubt about an issue. If having a reasonable doubt on a particular issue is not held to be a conclusive finding of fact, then very few issues with fall within issue estoppel's ambit, and the ends of finality will be poorly served. [Emphasis added]

19. The majority of the Court of Appeal therefore had jurisdiction pursuant to section 686(8) to limit the scope of Mr. Cowan's new trial, and the limiting order was consistent with appellate court authority on this point. The Crown had failed to prove the factual issue that Mr. Cowan was the masked robber. Justice required the limiting order to be made in this case to avoid "needlessly risking" an issue estoppel argument from Mr. Cowan at his new trial on the issue of principal liability. The pre-emptive approach to the use of 686(8) was referenced in *R.V.* at para 77:

> Finally, justice requires a stay of this proceeding. Before the Court of Appeal, the Crown represented that it would not seek to retry the sexual assault charge in the event of a retrial order (para. 179, per Rouleau J.A., dissenting). It has repeated that representation before this Court (transcript, at p. 44). Bearing that in mind, I am satisfied that ordering a retrial on the sexual assault charge would needlessly risk an abuse of process application (see *Jewitt*, at p. 148). It would also bring no benefit to the administration of justice. Taking those factors together, justice requires a stay rather than sending the charge back for retrial.

20. In the circumstances of this case, the trial judge had a reasonable doubt about Mr. Cowan's identity as a principal offender. The trial judge's doubt on the principal theory was clearly stated so as to make it "a necessary inference from the trial judge's findings or fact of the acquittal": *Mahalingan* at para 52. The Crown failed to convince the Court of Appeal that the trial judge's analysis on that issue suffered from any material error. The majority of the Court of Appeal therefore correctly determined that justice required that the Crown be prevented from relitigating the principal theory at a new trial.

21. Justice also requires respect for finality. The Crown's assertion that the trial judge's analysis on the issue of principal liability may or may not have contained an error fails to appreciate the point made by the Court of Appeal: that the Crown itself had failed to establish any error on the issue of principal liability on the standard of review applicable for Crown appeals from acquittals. The trial judge had a reasonable doubt about Mr. Cowan's identity as the principal robber. The Crown's appeal from the acquittal on the issue of principal liability was dismissed and the factual finding (based on the trial judge's expression of doubt) that Mr. Cowan was not the masked robber remains undisturbed. In this way, the factual finding that Mr. Cowan was not proven to be the masked robber is final and must be respected. It would be contrary to the interests of justice – and patently unfair to Mr. Cowan - to allow the Crown to raise the issue again at a new trial because it would effectively allow the Crown to collaterally attack the unanimous Court of Appeal decision on the principal liability theory.

22. The limiting order also does not cause undue prejudice for the Crown. The Crown can tender the evidence it can in support of its party liability theory at the limited new trial. The Crown acknowledges the evidence may or may not be the same at a new trial, but a whole new trial risks wasting the court's resources, the witnesses time, and Mr. Cowan's money. In short, a whole new

trial would prejudice all involved: *Yelle* at para 18. Conversely, double jeopardy principles and the notions of fairness underling issue estoppel cannot and should not accepted as matters that prejudice the Crown by limiting a new trial. A limited new trial would be fair in the circumstances of this case.

The Crown Misinterprets *R v MacKay*

23. Finally, the Crown's reliance on *R v MacKay*, 2005 SCC 79, [2005] 3 SCR 725, is misplaced. *R v MacKay* is distinguishable because it involved a jury. The decision should not be interpreted as holding that justice can never require limited new trials on separate theories of liability, but in the circumstances of that case a limiting order was not appropriate. The distinction arises because the fact-finding process when a jury is involved. As was put in *R v Thomas*, [1998] 3 SCR 535 as para 24:

> The principle that is reflected in s. 686(4) is that great respect should be shown to juries – both the original jury that heard the case and, more relevant for present purposes, the jury that will hear the new trial. In my view, appeal courts should not lightly restrict the plenitude of the jury's jurisdiction on a new trial by confining the scope of the issues normally within its province.

24. Similarly, in *R v Punko*, 2012 SCC 39 at para 8, [2012] 2 SCR 396, this Court emphasized that issue estoppel is more narrowly constrained when juries are involved:

> In applying the doctrine of issue estoppel where the prior proceeding was before a jury, "[t]he question is whether a finding in favour of the accused is logically necessary to the verdict of acquittal" (*Mahalingan*, at para. 53 (emphasis added)), not whether the general circumstances of the case tend to indicate that the jury resolved the issue in favour of the accused.

25. In other words, *MacKay* does not stand for the proposition that an order under section 686(8) that limits the Crown to a theory of liability cannot be made, but that in the circumstances of that particular jury trial, it was not in the interests of justice to limit the Crown to one definition of assault. In fact, the Crown acknowledges at para 119 of its factum that the assault issue in *MacKay* was not conclusively resolved in the accused's favour. In Mr. Cowan's case and the trial judge's express findings on the issue of principal liability, it was.

26. The Court of Appeal's order limiting the scope of Mr. Cowan's new trial was therefore what justice required in this case because it would prevent the Crown from unfairly relitigating its principal theory despite the trial judge's clear findings of fact and reasonable doubt on the issue. The Crown failed to convince the Court of Appeal that the trial judge's analysis on that issue suffered from any material error. The majority of the Court of Appeal therefore correctly determined that justice required a limited trial to prevent the Crown from relitigating the principal theory at a new trial after the Crown was unsuccessful on appeal on that issue.

PART IV: SUBMISSIONS ON COSTS

27. Mr. Cowan does not seek any order for costs.

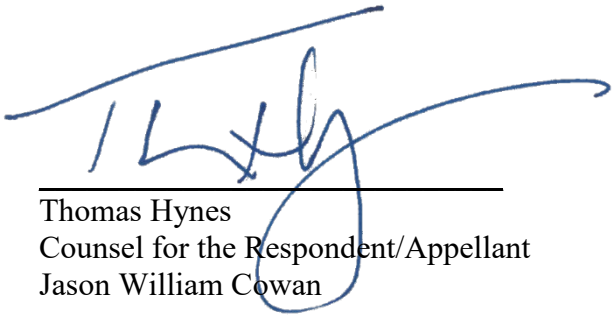
PART V: ORDER SOUGHT

28. Mr. Cowan requests that if his appeal as of right is dismissed, the Crown's appeal be dismissed as well.

PART VI: IMPACT OF ANY ORDER, RESTRICTION OR BAN

29. Not applicable. This matter is not subject to any sealing or confidentiality order, publication ban, classification of information in the file as confidential under legislation or restriction on public access to information in the file.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 28 DAY OF APRIL 2021.

Per: 

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PART VII: TABLE OF AUTHORITIES

Case Law	**Paragraph Reference**
R v Bellusci, 2012 SCC 44, [2012] 2 SCR 509.	12, 14
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Legislation	
Criminal Code, RSC 1985, c C-46, s 686(8). *Code criminel* (LRC (1985), ch. C-46), art 686(8).	9